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EXAMINER

BEKKER, KELLY JO

ART UNIT

PAPER NUMBER

1781

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary****Application No.**

10/629,991

**Applicant(s)**

STEVENS ET AL.

**Examiner**

KELLY BEKKER

**Art Unit**

1781

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 02 December 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-23 and 35-49 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-23 and 35-49 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-940)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB-08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Claim Objections***

The objection to claims 35-42, 48, and 49 because Claim 35 recited, "wherein the mix of ingredients comprise *from* wheat starch in an amount of from 49.31% to about 60%..." has been withdrawn in light of applicant's amendments made December 2, 2010.

### ***Claim Rejections - 35 USC § 112***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 112 second paragraph rejection of claims 6, 10-14, 22, and 43-47 as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention, specifically for the recitation in claim 6 of "wherein the oxidized and substituted wheat starch comprises and oxidized and acetylated wheat starch" and in claim 10 of "the coating composition comprises from about 32% to about 40% by weight corn dextrin" has been withdrawn in light of applicant's amendments made December 2, 2010.

The following rejections are necessitated by applicant's amendments:

Claims 1-23 and 35-49 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "does not detract from the appearance of the toaster pastry product" in claims 1, 17, and 35 is a relative term which renders the claim indefinite. The term "does not detract from the appearance of the toaster pastry product" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. The term is subjective based on the viewer and thus the metes and bounds of the claim are unclear and the language fails to particularly point out and

distinctly claim the subject matter. For example, what one person may consider to be detracting in appearance another person may enjoy.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Roskam:

The 103(a) rejection of claims 1-5, 7-9, and 14-23 as being unpatentable over Roskam et al. (US 2003/0044488 A1) in view of Lenchin et al (US 4510166) has been withdrawn in light of applicant's affidavit filed December 2, 2010; specifically applicant has shown that the referred portions of the Roskam reference were not by another.

The 103(a) rejection of claim 6 as being unpatentable over Roskam in view of Lenchin et al (US 4510166), further in view of Fennema ed. (Food Chemistry 3<sup>rd</sup> Edition pages 201-204) has been withdrawn in light of applicant's affidavit filed December 2, 2010; specifically applicant has shown that the referred portions of the Roskam reference were not by another.

Lazard:

The 103(a) rejection of claims 1-5, 7-11, 14-20, 22, 23, and 43-46 as being unpatentable over Lazard et al. (EP 0547551 A1) in view of Tsen et al (US 3773521) has been withdrawn in light of applicant's amendments and evidence submitted December 2, 2010; specifically, applicant has shown that the coating of Lazard is clear, but visible and appears to be detracting from the appearance of the toaster pastry product.

The 103(a) rejection of claims 12, 13, 21, and 47 as being unpatentable over Lazard et al. (EP 0547551 A1) in view of Tsen et al (US 3773521), further in view of Lenchin et al. (US 4510166) has been withdrawn in light of applicant's amendments and evidence submitted December 2, 2010; specifically, applicant has shown that the coating of Lazard is clear, but visible and appears to be detracting from the appearance of the toaster pastry product.

The 103(a) rejection of claim 6 as being unpatentable over Lazard et al. (EP 0547551 A1) in view of the combination of Tsen et al (US 3773521), further in view Fennema ed. (Food Chemistry 3<sup>rd</sup> Edition pages 201-204) has been withdrawn in light of applicant's amendments and evidence submitted December 2, 2010; specifically, applicant has shown that the coating of Lazard is clear, but visible and appears to be detracting from the appearance of the toaster pastry product.

The 103(a) rejection of claims 35-38, 41, and 48 as being unpatentable over Lazard et al. (EP 0547551 A1) in view of the combination of Tsen et al (US 3773521) and Baur et al (WO 94/21143) has been withdrawn in light of applicant's amendments and evidence submitted December 2, 2010; specifically, applicant has shown that the coating of Lazard is clear, but visible and appears to be detracting from the appearance of the toaster pastry product.

The 103(a) rejection of claims 39, 40, 42, and 49 as being unpatentable over Lazard et al. (EP 0547551 A1) in view of the combination of Tsen et al (US 3773521) and Baur et al (WO 94/21143), further in view Fennema ed. (Food Chemistry 3<sup>rd</sup> Edition pages 201-204) has been withdrawn in light of applicant's amendments and evidence submitted December 2, 2010; specifically, applicant has shown that the coating of Lazard is clear, but visible and appears to be detracting from the appearance of the toaster pastry product.

The following rejections have been necessitated by applicant's amendments, specifically, the addition of the limitation, "that does not detract from the appearance of the toaster pastry product" to the independent claims.

Van Beirendonck

Claims 1, 3, 4, 7, 8, 11-19, 22, 23, 35-38, 41, 43-45, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Van Beirendonck (US 2004/0028784 A1) in view of Stevens et al (WO 01/56393 A1) and Wallin et al (US 4,623,542) and Tsen et al (US 3,773,521).

Van Beirendonck (VB) teaches of a coated parfried food product (abstract) wherein the coating is transparent and invisible, and thus does not detract from the appearance of the product (paragraph 0084), retards moisture transmission, and thus gives a moisture barrier (abstract), is applied and thermally processed (paragraphs 0052-0054), and comprises 45-65% wheat starch, 10-35% dextrin, and 0.5-2% leavening agents of sodium acid pyrophosphate and sodium bicarbonate by dry weight of the batter mix (paragraphs 0015, 0019, 0026, 0068, and 0089-0097). In the example, paragraphs 0089-0096, VB teaches that the leavening system comprises 0.5% sodium acid pyrophosphate and 0.5% sodium bicarbonate by dry weight of the composition. As VB does not teach heating or cooling of the slurry for application, one of ordinary skill in the art would expect that the coating process of the slurry taught by VB occurs at room temperature, which is about 70F. VB does not teach the addition of a sweetener and/or stabilizer (all), and thus encompasses a teaching of 0% of the sweetener and/or stabilizer. VB teaches that the slurry is mixed with water and has a pick up of about 9-11% on the product (paragraphs 0089-0099).

VB is silent to the parfried food as a toaster pastry comprised in part from wheat flour as recited in claims 1, 17, and 35, to the toaster pastry as comprising low moisture content dough as recited in claim 3, to the slurry pick up on the toaster pastry as about 5-30% as recited in claim 16, to the dextrin as corn dextrin as recited in claims 1, 17, and 35, the solubility of the corn dextrin as less than about 32% soluble in about 77F water as recited in claim 12, preferably less than 15% soluble in about 77F water as recited in claim 13, the coating as comprising about 10-20% granulated sugar as recited in claim 35, preferably about 14% as recited in claim 38, about 1.8% sodium acid pyrophosphate, about 1.2% sodium bicarbonate, and about 0.15% xanthan gum, which is a stabilizer, as recited in claim 38, to the stabilizer as xanthan gum as recited in claim 48, and to the viscosity of the slurry as about 8-40 seconds as measured by the Stein viscosity method as recited in claim 41.

Stevens et al (Stevens) teaches of a coating composition for foods, including fried or parfried foods, that is applied prior to cooking and has a substantially clear appearance after frying or parfrying and substantially increases both crispness and

tenderness while maintaining good taste and tooth compaction characteristics desirable to the final consumer (page 1 lines 3-9). Stevens teaches that the coating does not sacrifice the appearance or flavor of the product desirable to the consumers (page 5 lines 20-25), thus teaching that the coating does not detract from the appearance. Stevens teaches that the coating is applied as a slurry with about 35-50% solids (page 4 lines 8-13) comprising, by dry weight, about 25-70% rice component and dextrin in a ratio of about 1:1 to 5:1 (abstract). Thus the coating as taught by Stevens, by dry weight, comprises about 12.5% rice component (1:1 ratio at 25%) to about 58.3% rice component (5:1 ratio at 70%) and about 4.2% dextrin (5:1 ratio at 25%) to about 35% dextrin (1:1 ratio at 70%). Stevens teaches that the rice component may be a rice derivative, including starch (page 5 lines 8-10), thus teaching that the rice component, which is about 12.5-58.3% by dry weight of the coating, is rice starch. Stevens teaches that the dextrin may be potato, tapioca, and/or corn, in high or low solubility (page 5 lines 10-13). Stevens teaches that preferably a low solubility dextrin is used in the coating composition in order for the coating to form a uniform coat and to increase the strength of the coating (page 5 line 30 through page 6 line 1). Stevens teaches that corn starch, potato starch, and wheat flour cause the coating to trap in moisture (page 6 line 5). Stevens teaches that coating may contain additional ingredients without detracting from its discovered benefits, including corn starch, potato starch, leavening ingredients, stabilizers, and flavors, such as sugar (page 7 lines 13-18). In an example with potato strips, Stevens teaches that the coated product has a 12% moisture content, the coating is applied at about 55F, and comprises 30-50% solids which include about 1% sodium acid pyrophosphate, 0.7% sodium bicarbonate, 2% sugar, and 0.2% xanthan gum (page 8 lines 17-24 and page 9, Table 1). In claim 7, Stevens teaches that the dextrin is a low solubility corn dextrin. In claim 12, Stevens teaches that the coating comprises a modified potato starch. In claim 17, Stevens teaches that the coating comprises at least about 1% of a leavening agent combination of sodium acid pyrophosphate and sodium bicarbonate. In claim 19, Stevens teaches that the coating comprises at least 1% of a sweetener, sugar. In claim 23, Stevens teaches that the coating contains at least about 0.1% of a stabilizing agent, xanthan gum.

Wallin et al (Wallin) teaches of a toaster pastry which is cooked or fried and frozen for subsequent thawing (abstract). Wallin teaches that the product minimizes often undesirable moisture migration (abstract), which causes sogginess of dough (Column 3 lines 54-55). Wallin teaches that conventional toaster pastries which have increased shelf life have dough with a moisture content of about 8-12% which produce a dry product with low flavor impact and mouth feel quality (Column 1 lines 39-52). Wallin teaches that toaster pastry products are desired to have a crispy tender crust (Column 1 lines 54-60 and Column 6 lines 24-38). Wallin teaches that viscosity control is accomplished by control of the starch level and gum levels within the food composition (Column 4 lines 65-68). Wallin teaches that toaster pastries can be produced with wheat flour (Column 13 line 51).

Tsen et al (Tsen) teaches that wheat flour based breads, baked or fired foods are staple foods in many countries because of their relatively high caloric value, ready availability of wheat flour at an economical price, and attractive organoleptic and appearance properties of the food products (Column 1 lines 20-25).

Regarding the parfried food as a toaster pastry, as VB teaches of a coating for parfried foods, it would have been obvious to one of ordinary skill in the art to for the substrate to be a known parfried food, such as a toaster pastry as taught by Wallin, based upon the final product desired. For example, one would have been motivated to use a toaster product in order to have a final product which was heated in the toaster before consumption and could be eaten as a breakfast or quick snack. Furthermore, one of ordinary skill in the art would have been motivated to use a toaster pastry, as such substrates were known to have problems with moisture migration, wherein the dough becomes soggy as taught by Wallin, and as the coating of VB teaches of retarding moisture transmission, such as from the atmosphere.

Regarding the pastry product as comprising wheat flour, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise particular ingredients depending on the final product desired. For example, one of ordinary skill in the art would have been motivated for the pastry product to comprise wheat flour in order to produce a high caloric product as taught by



Tsen. It would have been further obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise wheat flour since it was ready available at an economical price, and has attractive organoleptic and appearance properties when used in food products, as taught by Tsen.

Regarding the toaster pastry as comprising low moisture content dough, it would have been obvious to one of ordinary skill in the art for the toaster pastry to have a low moisture content dough in order to produce a conventional stable toaster pastry product, as was known in the art, such as taught by Wallin. One would have been specifically motivated to use the low moisture product when a stable, drier, and lower flavor impact was desired in the final product as suggested by Wallin. Both low and high moisture content dough were well known at the time the invention was made and to chose one or the other for the pastry product would be within the routine determination of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims.

Regarding the slurry pick up on the toaster pastry as about 5-30%, as VB teaches of the same coating slurry composition as instantly claimed, one of ordinary skill in the art would expect that the coating slurry as taught by VB posses the same properties, including slurry pick up percentage, as the instantly claimed coating absent any clear and convincing arguments and/or evidence to the contrary. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry coating to be of a thickness, and thus to have a specific pick up, depending on the properties desired in the final coating. To adjust the thickness and pick up of the coating composition would be routine determination of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the dextrin as corn dextrin, it would have been obvious to one of ordinary skill in the art to use a conventional and known starch coating dextrin, including corn dextrin as taught by Stevens. To use one known dextrin or another would have

been a matter of routine determination and would be substituting one functional equivalent for another.

Regarding the solubility of the corn dextrin as less than about 32% soluble in about 77F water, preferably less than 15% soluble in about 77F water, it would have been obvious to one of ordinary skill in the art to use a low solubility dextrin in the coating composition in order to form a uniform coating with increased strength as taught by Stevens. It is noted that Stevens does not teach the specific solubility levels, however, one of ordinary skill in the art would expect the teaching of a "low solubility" to encompass, less than 32% and less than 15%, as instantly claimed, absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the coating as comprising about 10-20%, preferably 14% granulated sugar, it would have been obvious to one of ordinary skill in the art to add conventional starch coating ingredients to the composition of VB for their known and intended function. To add a known component for its known and expected result would have been obvious and routine determination to one of ordinary skill in the art. For example, one of ordinary skill in the art would have been motivated for the coating to include greater than 1% granulated sugar in the coating composition in order to impart a sweeter flavor as taught by Stevens.

Regarding the coating as comprising about 1.8% sodium acid pyrophosphate and about 1.2% sodium bicarbonate, it would have been obvious to one of ordinary skill in the art to add conventional starch coating ingredients to the composition of VB for their known and intended function. To add a known component for its known and expected result would have been obvious and routine determination to one of ordinary skill in the art. For example, VB teaches of a coating comprising about 0.5% sodium acid pyrophosphate and about 0.5% sodium bicarbonate as leavening agents, which were known to impart crunch to starch coatings; One of ordinary skill in the art would have been motivated for the coating to include a greater amount of the specified leavening agents in order to increase the effective amount of crunchiness in the coating.

Regarding the coating as comprising about 0.15% xanthan gum, which is a stabilizer, it would have been obvious to one of ordinary skill in the art to add

conventional starch coating ingredients to the composition of VB for their known and intended function. To add a known component for its known and expected result would have been obvious and routine determination to one of ordinary skill in the art. For example, one of ordinary skill in the art would have been motivated for the coating to include 0.1% or greater xanthan gum in the coating composition for stabilization as taught by Stevens.

Regarding the viscosity of the slurry as about 8-40 seconds as measured by the Stein viscosity method, as viscosity was known to be controlled and effected by composition, since the references teach of a coating composition which is the same as the instantly claimed composition, one of ordinary skill in the art would expect that the coating composition as taught by the references have the same properties, including viscosity, as the instantly claimed composition, absent any clear and convincing arguments and/or evidence to the contrary.

#### Stevens

Claims 1, 3, 4, 7, 11-18, 22, 23, 43, and 44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stevens et al (WO 01/56393 A1) in view of Wallin et al (US 4,623,542) and Tsen et al (US 3,773,521).

Stevens et al (Stevens) teaches of a coating composition for foods, including fried or parfried foods, that is applied prior to cooking and has a substantially clear appearance after frying or parfrying and substantially increases both crispness and tenderness while maintaining good taste and tooth compaction characteristics desirable to the final consumer (page 1 lines 3-9). Stevens teaches that the coating does not sacrifice the appearance or flavor of the product desirable to the consumers (page 5 lines 20-25), thus teaching that the coating does not detract from the appearance. Stevens teaches that the coating is applied as a slurry with about 35-50% solids (page 4 lines 8-13) comprising, by dry weight, about 25-70% rice component and dextrin in a ratio of about 1:1 to 5:1 (abstract). Thus the coating as taught by Stevens, by dry weight, comprises about 12.5% rice component (1:1 ratio at 25%) to about 58.3% rice

component (5:1 ratio at 70%) and about 4.2% dextrin (5:1 ratio at 25%) to about 35% dextrin (1:1 ratio at 70%). Stevens teaches that the rice component may be a rice derivative, including starch (page 5 lines 8-10), thus teaching that the rice component, which is about 12.5-58.3% by dry weight of the coating, is rice starch. Stevens teaches that the dextrin may be potato, tapioca, and/or corn, in high or low solubility (page 5 lines 10-13). Stevens teaches that preferably a low solubility dextrin is used in the coating composition in order for the coating to form a uniform coat and to increase the strength of the coating (page 5 line 30 through page 6 line 1). Stevens teaches that corn starch, potato starch, and wheat flour cause the coating to trap in moisture (page 6 line 5). Stevens teaches that coating may contain additional ingredients without detracting from its discovered benefits, including corn starch, potato starch, leavening ingredients, stabilizers, and flavors, such as sugar (page 7 lines 13-18). In an example with potato strips, Stevens teaches that the coated product has 12% moisture content, the coating is applied at about 55F, and comprises 30-50% solids which include about 1% sodium acid pyrophosphate, 0.7% sodium bicarbonate, 2% sugar, and 0.2% xanthan gum (page 8 lines 17-24 and page 9, Table 1). In claim 7, Stevens teaches that the dextrin is a low solubility corn dextrin. In claim 12, Stevens teaches that the coating comprises a modified potato starch. In claim 17, Stevens teaches that the coating comprises at least about 1% of a leavening agent combination of sodium acid pyrophosphate and sodium bicarbonate. In claim 19, Stevens teaches that the coating comprises at least 1% of a sweetener, sugar. In claim 23, Stevens teaches that the coating contains at least about 0.1% of a stabilizing agent, xanthan gum. Thus the teachings of Stevens suggest a coating for fried foods with a moisture content of about 12% with a slurry at about 55F and a solids content of about 30-50% which comprises, by dry weight, 12.5-58.3% rice starch, about 4.2-35% low solubility corn dextrin, 1% or greater of a leavening composition comprising 1% sodium acid pyrophosphate, 0.7% sodium bicarbonate, at least 1% sugar as a sweetener, and at least about 0.1% xanthan gum as a stabilizing agent. It is noted that Stevens does not teach the specific solubility levels, however, one of ordinary skill in the art would expect the teaching of a "low

solubility" to encompass, less than 32% and less than 15%, as instantly claimed, absent any clear and convincing arguments and/or evidence to the contrary.

Stevens is silent to the parfried food as a toaster pastry comprised in part from wheat flour as recited in claims 1 and 17, to the toaster pastry as comprising low moisture content dough as recited in claim 3, to the slurry pick up on the toaster pastry as about 5-30% as recited in claim 16, to the coating as providing a moisture barrier as recited in claims 1, 4, and 17, the coating as comprising up to about 30% sweetener as recited in claims 7 and 17, which is granulated sugar as recited in claims 15 and 23, up to about 10% of leavening system as recited in claims 7 and 17, preferably about 0-5% sodium acid pyrophosphate and about 0-5% sodium bicarbonate as recited in claims 14 and 22, and up to about 3% stabilizer as recited in claims 7 and 17, and to the viscosity of the slurry as about 8-40 seconds as measured by the Stein viscosity method as recited in claim 41.

Wallin et al (Wallin) teaches of a toaster pastry which is cooked or fried and frozen for subsequent thawing (abstract). Wallin teaches that the product minimizes often undesirable moisture migration (abstract), which causes sogginess of dough (Column 3 lines 54-55). Wallin teaches that conventional toaster pastries which have increased shelf life have dough with a moisture content of about 8-12% which produce a dry product with low flavor impact and mouth feel quality (Column 1 lines 39-52). Wallin teaches that toaster pastry products are desired to have a crispy tender crust (Column 1 lines 54-60 and Column 6 lines 24-38). Wallin teaches that viscosity control is accomplished by control of the starch level and gum levels within the food composition (Column 4 lines 65-68). Wallin teaches that toaster pastries can be produced with wheat flour (Column 13 line 51).

Tsen et al (Tsen) teaches that wheat flour based breads, baked or fired foods are staple foods in many countries because of their relatively high caloric value, ready availability of wheat flour at an economical price, and attractive organoleptic and appearance properties of the food products (Column 1 lines 20-25).

Regarding the parfried food as a toaster pastry, as Stevens teaches of a coating for fried and parfried foods, it would have been obvious to one of ordinary skill in the art

to for the substrate to be a known fried or parfried food, such as a toaster pastry as taught by Wallin, based upon the final product desired. For example, one would have been motivated to use a toaster product in order to have a final product which was heated in the toaster before consumption and could be eaten as a breakfast or quick snack. Furthermore, one of ordinary skill in the art would have been motivated to use a toaster pastry, as such substrates were known to be desired as crispy and tender as taught by Wallin, and as the coating of Stevens substantially increases both crispness and tenderness while maintaining good taste and tooth compaction characteristics desirable to the final consumer

Regarding the pastry product as comprising wheat flour, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise particular ingredients depending on the final product desired. For example, one of ordinary skill in the art would have been motivated for the pastry product to comprise wheat flour in order to produce a high caloric product as taught by Tsen. It would have been further obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise wheat flour since it was readily available at an economical price, and has attractive organoleptic and appearance properties when used in food products, as taught by Tsen.

Regarding the toaster pastry as comprising low moisture content dough, it would have been obvious to one of ordinary skill in the art for the toaster pastry to have a low moisture content dough in order to produce a conventional stable toaster pastry product, as was known in the art, such as taught by Wallin. One would have been specifically motivated to use the low moisture product when a stable, drier, and lower flavor impact was desired in the final product as suggested by Wallin. Both low and high moisture content dough were well known at the time the invention was made and to chose one or the other for the pastry product would be within the routine determination of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims.

Regarding the slurry pick up on the toaster pastry as about 5-30%, as Stevens teaches of the same coating slurry composition as instantly claimed, one of ordinary

skill in the art would expect that the coating slurry as taught by Stevens possesses the same properties, including slurry pick up percentage, as the instantly claimed coating absent any clear and convincing arguments and/or evidence to the contrary. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry coating to be of a thickness, and thus to have a specific pick up, depending on the properties desired in the final coating. To adjust the thickness and pick up of the coating composition would be routine determination of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the coating as providing a moisture barrier, as Wallin teaches that pastry products were known to have problems with moisture migration to the dough, causing the dough to be soggy, and Stevens, teaches that the addition of specific ingredients, including wheat flour, which can prevent moisture transmission, it would have been obvious to one of ordinary skill in the art to include wheat flour in the coating composition for the toaster pastry, and thus provide a moisture barrier to the coating composition for the toaster pastry.

Regarding the coating as comprising up to about 30% sweetener, which is granulated sugar, Stevens teaches that the coating comprises 1% or greater sugar, which would encompass up to about 30% granulated sugar. Furthermore, as Stevens teaches that the sugar is added as flavoring, it would have been obvious to one of ordinary skill in the art to adjust the amount of sugar in the coating composition based upon the desired sweetness in the coating. To add a known ingredient for its known and intended function would have been obvious and routine determination to one of ordinary skill in the art.

Regarding the coating as comprising up to about 10% of leavening system, preferably about 0-5% sodium acid pyrophosphate and about 0-5% sodium bicarbonate Stevens teaches that the coating comprises 1% or greater leavening compositions, including 1% sodium acid pyrophosphate and 0.7% sodium bicarbonate, which would encompass up the instantly claimed range. Furthermore, as the leavening agents were

known to provide crispness, it would have been obvious to one of ordinary skill in the art to adjust the amount of the leavening composition in the coating composition based upon the desired crispness in the coating. To add a known ingredient for its known and intended function would have been obvious and routine determination to one of ordinary skill in the art.

Regarding the coating as including up to about 3% stabilizer Stevens teaches that the coating comprises 0.1% or greater xanthan gum stabilizer, which would encompass up the instantly claimed range. Furthermore, as the stabilizing agents were known to provide stability to products, it would have been obvious to one of ordinary skill in the art to adjust the amount of the stabilizer in the coating composition based upon the desired stability in the coating. To add a known ingredient for its known and intended function would have been obvious and routine determination to one of ordinary skill in the art.

Regarding the viscosity of the slurry as about 8-40 seconds as measured by the Stein viscosity method, as viscosity was known to be controlled and effected by composition, since the references teach of a coating composition which is the same as the instantly claimed composition, one of ordinary skill in the art would expect that the coating composition as taught by the references have the same properties, including viscosity, as the instantly claimed composition, absent any clear and convincing arguments and/or evidence to the contrary.

#### Higgins

Claims 1-23 and 43-47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins (US 5,753,286) in view of Stevens et al (WO 01/56393 A1) and Wallin et al (US 4,623,542) and Tsen et al (US 3,773,521) and Fennema (Food Chemistry 3rd Edition, pages 201-204).

Higgins teaches of a food coating composition which has an oil absorption and moisture transmission retarding properties, provides for a clear and crunchy coating (abstract), which provides for a longer shelf life, and gives the appearance of a foods



which have not been coated at all (Column 9 lines 15-27), and thus does not detract from the appearance of the product. Higgins teaches that the coating comprises a batter or slurry of about 15-35% solids (Column 5 lines 33-34 and Column 7 lines 16-23), which is applied to the substrate and then fried, wherein the slurry comprises on a dry weight basis 20% to greater than 95% dextrin which is a film former (Column 5 lines 29-37), 0.05-5% thickener, which is preferably xanthan gum (Column 5 lines 22-28), about 0.1-8% pectate (Column 5 lines 13-15), and 1-20% dextrose, which is a sweetener (Column 11 lines 1-3). Higgins teaches that the batter additionally includes 1-20% flavoring (Column 5 lines 38-56), conventional additives, including leavening agents (Column 10 lines 49-51), and 0-70% starch, including tapioca, corn, and wheat starch, which provides for decreased clearness but a very strong batter (Column 10 lines 52-65). Thus it would have been obvious to one of ordinary skill in the art to include wheat starch up to about 78.85% dry weight (0-70% starch/15-35% solids= 0-100% starch by dry weight, minus the required ingredients, 20% dextrin, 0.05% thickener, 1% dextrose, and 0.1% pectate= 78.85%) in the composition of Higgins in order to produce a strong batter. As Higgins does not teach heating or cooling for coating of the substrate (all), one of ordinary skill in the art would expect that the substrate is coated at room temperature which is about 70F. It is noted that the claims contain several optional limitations of about 0% of specified ingredients, as the ingredients are not required by Higgins, Higgins encompasses encompass the instantly claimed ranges.

Higgins is silent to the substrate as a toaster pastry comprising wheat flour as recited in claims 1, 17, and 35, wherein the pastry comprises low moisture content dough as recited in claim 3, to the dextrin as corn dextrin as recited in claims 1, 10, 11, 17, and 35, wherein the corn dextrin has a low solubility as recited in claims 21 and 47, preferably less than about 32% soluble in about 77F water as recited in claim 12, most preferably less than 15% soluble in about 77F water as recited in claim 13, to the coating as comprising modified wheat starch as recited in claims 2 and 9, wherein the starch is oxidized and substituted wheat starch as recited in claims 5, 10, 20, and 46, by acetylation to a substitution level of from 0.01-1% as recited in claims 6 and 39,

preferably to about 0.1% as recited in claims 40 and 49, to the slurry pick up as about 5-30% as recited in claim 16, to the coating as comprising 0-10% leavening composition as recited in claims 7 and 17, of about 0-5% sodium acid pyrophosphate and about 0-5% sodium bicarbonate as recited in claims 14 and 22, preferably about 0.5-2.5% and 0.5-2.5% respectively as recited in claim 35, most preferably about 1.8% and 1.2% respectively as recited in claim 38, about 0-30% sweetener as recited in claims 7 and 17, wherein the sweetener is granulated sugar as recited in claims 15 and 23, preferably about 10-20% granulated sugar as recited in claim 35, most preferably about 14% as recited in claim 38, about 0-3% stabilizer as recited in claims 7, 17, and 35, preferably about 0.15% as recited in claim 38, wherein the stabilizer is xanthan gum as recited in claims 37, 38, and 48, and to the viscosity of the coating as from about 8-40 seconds as measured by the Stein viscosity method as recited in claims 41 and 42.

Stevens et al (Stevens) teaches of a coating composition for foods, including fried or parfried foods, that is applied prior to cooking and has a substantially clear appearance after frying or parfrying and substantially increases both crispness and tenderness while maintaining good taste and tooth compaction characteristics desirable to the final consumer (page 1 lines 3-9). Stevens teaches that the coating does not sacrifice the appearance or flavor of the product desirable to the consumers (page 5 lines 20-25), thus teaching that the coating does not detract from the appearance. Stevens teaches that the coating is applied as a slurry with about 35-50% solids (page 4 lines 8-13) comprising, by dry weight, about 25-70% rice component and dextrin in a ratio of about 1:1 to 5:1 (abstract). Thus the coating as taught by Stevens, by dry weight, comprises about 12.5% rice component (1:1 ratio at 25%) to about 58.3% rice component (5:1 ratio at 70%) and about 4.2% dextrin (5:1 ratio at 25%) to about 35% dextrin (1:1 ratio at 70%). Stevens teaches that the rice component may be a rice derivative, including starch (page 5 lines 8-10), thus teaching that the rice component, which is about 12.5-58.3% by dry weight of the coating, is rice starch. Stevens teaches that the dextrin may be potato, tapioca, and/or corn, in high or low solubility (page 5 lines 10-13). Stevens teaches that preferably a low solubility dextrin is used in the coating composition in order for the coating to form a uniform coat and to increase the

strength of the coating (page 5 line 30 through page 6 line 1). Stevens teaches that corn starch, potato starch, and wheat flour cause the coating to trap in moisture (page 6 line 5). Stevens teaches that coating may contain additional ingredients without detracting from its discovered benefits, including corn starch, potato starch, leavening ingredients, stabilizers, and flavors, such as sugar (page 7 lines 13-18). In an example with potato strips, Stevens teaches that the coated product has a 12% moisture content, the coating is applied at about 55F, and comprises 30-50% solids which include about 1% sodium acid pyrophosphate, 0.7% sodium bicarbonate, 2% sugar, and 0.2% xanthan gum (page 8 lines 17-24 and page 9, Table 1). In claim 7, Stevens teaches that the dextrin is a low solubility corn dextrin. In claim 12, Stevens teaches that the coating comprises a modified potato starch. In claim 17, Stevens teaches that the coating comprises at least about 1% of a leavening agent combination of sodium acid pyrophosphate and sodium bicarbonate. In claim 19, Stevens teaches that the coating comprises at least 1% of a sweetener, sugar. In claim 23, Stevens teaches that the coating contains at least about 0.1% of a stabilizing agent, xanthan gum.

Wallin et al (Wallin) teaches of a toaster pastry which is cooked or fried and frozen for subsequent thawing (abstract). Wallin teaches that the product minimizes often undesirable moisture migration (abstract), which causes sogginess of dough (Column 3 lines 54-55). Wallin teaches that conventional toaster pastries which have increased shelf life have dough with a moisture content of about 8-12% which produce a dry product with low flavor impact and mouth feel quality (Column 1 lines 39-52). Wallin teaches that toaster pastry products are desired to have a crispy tender crust (Column 1 lines 54-60 and Column 6 lines 24-38). Wallin teaches that viscosity control is accomplished by control of the starch level and gum levels within the food composition (Column 4 lines 65-68). Wallin teaches that toaster pastries can be produced with wheat flour (Column 13 line 51).

Tsen et al (Tsen) teaches that wheat flour based breads, baked or fired foods are staple foods in many countries because of their relatively high caloric value, ready availability of wheat flour at an economical price, and attractive organoleptic and appearance properties of the food products (Column 1 lines 20-25).

Fennema teaches that starches are modified to improve their behavioral characteristics (Page 201 Section 4.4.9 Paragraph 1). Fennema teaches that modified starch usually are stabilized with a substitution level of less than 0.1 and generally within the range of 0.002-0.2 (Page 201 Section 4.4.9 Paragraph 3). Fennema teaches that acetylation of starch lowers gelatinization temperature, improves paste clarity, and provides stability to coating compositions (page 202).

Regarding the parfried food as a toaster pastry, as Higgins teaches of a coating for fried and parfried foods, it would have been obvious to one of ordinary skill in the art to for the substrate to be a known fried or parfried food, such as a toaster pastry as taught by Wallin, based upon the final product desired. For example, one would have been motivated to use a toaster product in order to have a final product which was heated in the toaster before consumption and could be eaten as a breakfast or quick snack. Furthermore, one of ordinary skill in the art would have been motivated to use a toaster pastry, as such substrates were known to be desired as crispy, with reduced oil, and with reduced moisture transmission, as taught by Wallin, and as the coating of Higgins was taught by reduce oil absorption and moisture transmission, and increase tenderness while maintaining a undetectable appearance, and longer shelf life.

Regarding the pastry product as comprising wheat flour, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise particular ingredients depending on the final product desired. For example, one of ordinary skill in the art would have been motivated for the pastry product to comprise wheat flour in order to produce a high caloric product as taught by Tsen. It would have been further obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise wheat flour since it was ready available at an economical price, and has attractive organoleptic and appearance properties when used in food products, as taught by Tsen.

Regarding the toaster pastry as comprising low moisture content dough, it would have been obvious to one of ordinary skill in the art for the toaster pastry to have a low moisture content dough in order to produce a conventional stable toaster pastry product, as was known in the art, such as taught by Wallin. One would have been

specifically motivated to use the low moisture product when a stable, drier, and lower flavor impact was desired in the final product as suggested by Wallin. Both low and high moisture content dough were well known at the time the invention was made and to chose one or the other for the pastry product would be within the routine determination of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims.

Regarding the dextrin as corn dextrin, it would have been obvious to one of ordinary skill in the art to use a conventional and known starch coating dextrin, including corn dextrin as taught by Stevens. To use one known dextrin or another would have been a matter of routine determination and would be substituting one functional equivalent for another.

Regarding the solubility of the corn dextrin as less than about 32% soluble in about 77F water, preferably less than 15% soluble in about 77F water, it would have been obvious to one of ordinary skill in the art to use a low solubility dextrin in the coating composition in order to form a uniform coating with increased strength as taught by Stevens. It is noted that Stevens does not teach the specific solubility levels, however, one of ordinary skill in the art would expect the teaching of a "low solubility" to encompass, less than 32% and less than 15%, as instantly claimed, absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the coating as comprising modified wheat starch, wherein the starch is oxidized and substituted by acetylation to a substitution level of from 0.01-1%, as discussed above, it would have been obvious to one of ordinary skill in the art for the coating composition to include wheat starch for strengthening as taught by Higgins. One would have been motivated for the wheat starch to be modified to improve the properties of the starch as taught by Fennema. It would have been further obvious to one of ordinary skill in the art to chose a conventional and well known modification based on the intended function of the starch. For example, it would have been obvious to one of ordinary skill in the art to treat the starch by acetylation in order to lower gelatinization temperature, improve paste clarity, and provide stability to coating compositions as taught by Fennema; It would have been further obvious to one of

ordinary skill in the art for the substitution level of the starch to be within a normal range of usually less than 0.1 and within the range of 0.002-0.2 as taught by Fennema, since it was commonly utilized in foods and would be readily available; and It would have been further obvious to one of ordinary skill in the art for the starch to be oxidized as oxidized starches were known to produce relatively clear, less viscous, and softer gels. To use known and routine starch modifications for their known and intended function would have been obvious and routine determination to one of ordinary skill in the art. Thus the product of Higgins in view of Fennema comprising wheat starch would produce a coating with improved strength as taught by Higgins, while maintaining clarity, as suggested by Fennema.

Regarding the slurry pick up on the toaster pastry as about 5-30%, as Higgins teaches of the same coating slurry composition as instantly claimed, one of ordinary skill in the art would expect that the coating slurry as taught by Higgins possesses the same properties, including slurry pick up percentage, as the instantly claimed coating absent any clear and convincing arguments and/or evidence to the contrary. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry coating to be of a thickness, and thus to have a specific pick up, depending on the properties desired in the final coating. To adjust the thickness and pick up of the coating composition would be routine determination of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the coating as comprising about 0-30% sweetener, preferably about 10-20%, most preferably 14% granulated sugar, it would have been obvious to one of ordinary skill in the art to add conventional starch coating ingredients to the composition of Higgins for their known and intended function. To add a known component for its known and expected result would have been obvious and routine determination to one of ordinary skill in the art. For example, one of ordinary skill in the art would have been motivated for the coating to include greater than 1% granulated sugar in the coating composition in order to impart a sweeter flavor as taught by Stevens.

Regarding the coating as comprising 0-10% of a leavening composition of about 0-5%, preferably 0.5-2.5%, most preferably about 1.8% sodium acid pyrophosphate and about 0-5%, preferably about 0.5-2.5%, most preferably about 1.2% sodium bicarbonate, it would have been obvious to one of ordinary skill in the art to add conventional starch coating ingredients to the composition of Higgins for their known and intended function. To add a known component for its known and expected result would have been obvious and routine determination to one of ordinary skill in the art. For example, one of ordinary skill in the art would have been motivated for the coating to include greater than 1% of a leavening composition, such as about 1% sodium acid pyrophosphate and about 0.7% sodium bicarbonate as taught by Stevens, in order to affect the crunchiness in the coating.

Regarding the coating as comprising about 0-3%, preferably about 0.15% stabilizer, wherein the stabilizer is xanthan gum, it would have been obvious to one of ordinary skill in the art to add conventional starch coating ingredients to the composition of Higgins for their known and intended function. To add a known component for its known and expected result would have been obvious and routine determination to one of ordinary skill in the art. For example, one of ordinary skill in the art would have been motivated for the coating to include 0.1% or greater xanthan gum in the coating composition for stabilization as taught by Stevens.

Regarding the viscosity of the slurry as about 8-40 seconds as measured by the Stein viscosity method, as viscosity was known to be controlled and effected by composition, since the references teach of a coating composition which is the same as the instantly claimed composition, one of ordinary skill in the art would expect that the coating composition as taught by the references have the same properties, including viscosity, as the instantly claimed composition, absent any clear and convincing arguments and/or evidence to the contrary.

### ***Response to Arguments***

Applicant's arguments with respect to the prior art rejections have been considered but are moot in view of the new ground(s) of rejection.

### ***Terminal Disclaimer***

The terminal disclaimer filed on December 2, 2010 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of US Patent No. 7,294,355 has been reviewed and is accepted. The terminal disclaimer has been recorded.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-23 and 35-49 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-19 of copending Application No. 12/257,249 ('249) in view of Tsen et al (US 3773521). The references and rejection are incorporated herein and as cited in the office action mailed June 2, 2010. Specifically regarding the newly added limitation, as '249 claims the



coating is invisible, one of ordinary skill in the art would expect that it would not detract from the appearance of the product.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1, 3, 4, 7, 14-19, 22, and 23 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 5, 7, 9, and 16 of copending Application No. 11/933,091 ('091) in view of Tsen et al (US 3773521). The references and rejection are incorporated herein and as cited in the office action mailed June 2, 2010. Specifically regarding the newly added limitation, as '091 claims the coating is invisible, one of ordinary skill in the art would expect that it would not detract from the appearance of the product.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

The nonstatutory obvious type double patenting rejection of claims 1, 3, 4, 7, 14-19, 22, and 23 as being unpatentable over claims 1, 6, 9, 16, 18, 51, and 52 of U.S. 7,294,355 ('355) in view of Tsen et al (US 3773521) has been withdrawn in light of applicant's terminal disclaimer filed December 2, 2010.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KELLY BEKKER whose telephone number is (571)272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Kelly Bekker/  
Primary Examiner  
Art Unit 1781